SUPREME COURT, U.S.
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No. 482

IN THE

Supreme Court of the United States

THE NEW YORK CENTRAL RAILROAD COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, and

INTERSTATE COMMERCE COMMISSION,

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO, INC., INTERSTATE MOTOR FREIGHT SYSTEM, and ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, and THE AMERICAN WATERWAYS OPERATORS, INC., and THE GREAT LAKES SHIP OWNERS ASSOCIATION,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE NEW YORK CENTRAL RAILROAD COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION,

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO, INC., INTERSTATE MOTOR FREIGHT SYSTEM, AND ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, AND THE AMERICAN WATERWAYS OPERATORS, INC., AND THE GREAT LAKES SHIP OWNERS ASSOCIATION,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Southern District of New York, dismissing plaintiff's request to permanently enjoin, annul and set aside an order of the Interstate Commerce Commission. The Supreme Court of the United States has jurisdiction of the appeal and a substantial question is presented.

Opinion Below

The opinion of the District Court for the Southern District of New York is reported in 194 F. Supp. 947. The opinion of the Interstate Commerce Commission is reported in 313 I.C.C. 247. Copies of the opinion of the court below and of the report of the Interstate Commerce Commission are attached hereto as Appendix A.

Jurisdiction

This suit was brought under Title 28, United States Code, Section 1336, to set aside, annul and enjoin an order of the Interstate Commerce Commission. The judgment of the District Court was entered on June 14, 1961, and notice of appeal was filed in that court on August 11, 1961. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944); *Schaffer Transportation Co.* v. *United States,* 355 U. S. 83 (1957).

Questions Presented

1. Is the Commission's application of the "destructive competitive practices" provision of the National Transportation Policy to the contract rate in question arbitrary and capricious and predicated upon a misconstruction of that provision?

2. Is the Commission's instant order arbitrary and capricious in that the Commission's report herein lacks the degree of clarity requisite to a valid administrative determination as defined in the decisions of this Court?

3. Is the Commission's condemnation of the contract rate in question arbitrary and capricious for failure to articulate the standard or construction of the "destructive competitive practices" provision of the National Transportation Policy which it applied?

4. Assuming the findings intended to support the Commission's condemnation of the contract rate in question can be ascertained, are these findings supported by substantial evidence or are they contrary to the evidence of record?

Statute Involved

National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1 of the Interstate Commerce Act as set forth in Appendix B hereto.

Statement of the Case

Appellant sought to establish, effective September 30, 1959, in its Local Contract Tariff CC-1, a contract rate on rugs and carpeting in carloads from Amsterdam, N. Y., to Chicago, Illinois. These contract rates provide for a reduction from the normally applicable tariff rate if the shipper executes a contract with appellant which provides, for a period of one year, that the shipper will agree to move at least 80 percent of its Amsterdam to Chicago traffic over the lines of the plaintiff.

The shipper is required to furnish an indemnity bond guaranteeing the payment of the difference between the contract rate and the higher non-contract rates which would become effective in the event the shipper should fail to ship the requisite percentage. The contract also provides that the shipper agrees to permit inspection of pertinent shipping data in its records and, at the end of the contract term, to furnish the appellant an affidavit setting forth the total tonnage shipped by all modes of transportation. The agreement also prohibits the appellant from

voluntarily increasing the contract rate during the term thereof and permits the shipper to cancel without the payment of any further charges if appellant fails to deliver 70 percent of the traffic at Chicago with reasonable dispatch, defined in the contract as, on or before the sixth morning after its receipt at Amsterdam. The contract rate is available to all shippers or receivers willing to execute the contract. Other provisions concern renewal of the contract and its suspension during period of strike and other emergencies.

The proposed contract rate was protested by the various water and motor carriers who were intervenor-defendants in the court below and the Commission, pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), suspended its operation until April 29, 1960, at which time it went into effect.

A one-year contract, as provided in the tariff, between the shipper, Mohasco Industries, Inc., and appellant, was executed on May 11, 1960. The required indemnity bond was simultaneously filed with appellant.

Pursuant to an agreed order entered by the Commission, all evidence was submitted in the form of verified statement and an examiner's proposed report was waived. Cross-examination was not requested by any party. Briefs were filed, and the case was argued orally before the entire Commission.

By report and order dated February 13, 1961 (313 I.C.C. 247), the Commission found the proposed contract rates "unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the National Transportation Policy." *Ibid.* at 254. The tariff was ordered cancelled on or before March 28, 1961. This date was extended by Commission order of March 3, 1961, to April 10, 1961.

The majority opinion of the Commission expresses the views of three Commissioners, Hutchinson, Tuggle and

Goff. It finds, at page 254, that "the contract rates under investigation are unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the National Transportation Policy declared in the Act." The opinion states that because of this finding contract rates are in violation of Section 1 of the Interstate Commerce Act, and that there are no ultimate findings made under any other section of the Act.

Commissioners Winchell and McPherson concurred in the result without opinion. *Ibid.* at 255.

Commissioner Murphy concurred on the grounds that, although in agreement with the conclusions of the majority, he believed the rates under investigation were also violative of Sections 2 and 3 of the Interstate Commerce Act, and the Elkins Act (32 Stat. 847, 49 U.S.C. §§ 42, 43). *Ibid.* at 254-255.

Commissioners Walrath and Webb "reluctantly" concurred in the result on the grounds that the rates in question "could well" mean the end of the present national transportation system and prevent the achievement of a truly coordinated transportation system in the future. *Ibid.* at 255.

Commissioners Freas and Herring dissented on the grounds that the proposed rates were not shown to have been unlawful. The dissenting opinion reviews what it considers to be the controlling bases for the majority findings and concludes that those findings are unsupported. *Ibid.* at 255-258.

Prior to the effective date of the Commission's order, appellant by order to show cause, signed on March 29, 1961, applied for a temporary restraining order to restrain the Commission and the Government from enforcing the Commission's orders pending hearing by the three-judge statutory court. Notice was given to all appellees herein and the application for the temporary restraining order was

argued before Palmieri, U.S.D.J., on April 4, 1961. By opinion dated April 7, 1961, Judge Palmieri denied the application on the ground that appellant had not adduced sufficient proof to warrant the requested relief. Thereupon, the tariff was cancelled on April 10, 1961, on one day's notice, in compliance with the Commission's orders.

Appellant, on March 28, 1961, filed a complaint in the District Court for the Southern District of New York, pursuant to Title 28, U.S.C. Section 1336, which sought to permanently enjoin, set aside, annul and suspend the orders of the Commission. Briefs were filed and oral hearing was held on June 2, 1961, before the three-judge statutory court comprised of Friendly, U.S.C.J., Palmieri, U.S.D.J., and Metzner, U.S.D.J. In an opinion written by Judge Friendly, the three-judge court dismissed the complaint and denied appellant's request for injunctive relief.

The Questions Are Substantial

This case brings before this court for the first time, the legality of duly published and filed freight contract rates subject to Part I of the Interstate Commerce Act. This is a matter of great importance to the transportation industry as evidenced by the participation in this litigation of associations representing principal water and motor carriers operating in this country despite the fact that the particular movement of traffic involved directly affects only a few common motor carriers. This matter has received the attention of the committees in Congress having jurisdiction over transportation and has been an important and controversial topic in transportation circles for some time. Thus, important and far-reaching questions concerning the interpretation and administration of the Interstate Commerce Act are inherent in the instant case. Appellant contends that the Commission's construction of the pertinent portion of the National Transportation Policy as applied to the rates in question is arbitrary and

capricious and that the opinion of the court below which sustains, on different grounds, the Commission's application of this standard is unsupportable.

The condemnation of the rate in issue not only represents an arbitrary and capricious application of the destructive competitive practice provisions of the National Transportation Policy, but the decision of the Commission fails to conform to judicially evolved standards requisite to a valid and lawful determination. The Commission's opinion thus presents significant issues in the general field of administrative law, particularly with respect to the requirement that administrative agency opinions clearly set forth the bases upon which they rest and that the Commission's interpretation or construction of the statutory standard of lawfulness be set forth with the clarity necessary to enable a reviewing court to clearly understand what the agency has done. In addition, some of the findings of the Commission not only are lacking in evidentiary support, but also are in fact contrary to the evidence of record. Certainly, matters of this importance to the transportation industry should not be determined on the basis of a Commission report that is uncertain and confused.

1. In condemning the proposed contract rate, the Commission has applied the "destructive competitive practices" provision of the National Transportation Policy to a rate the level of which the report does not even question. It is the contractual aspect of the rate which is the source of this purported illegality under this provision.

The pertinent legislative history indicates that rate levels and not the form of publication of rates which were already fully protected under Section 6 of the Act, were the concern of Congress when it enacted this provision. The congressional purpose was to halt the then prevalent practice of rate slashing by carriers which was threatening their solvency. There is no indication that the phrase was intended to give the Commission carte blanche to con-

demn new forms of rate making not otherwise violative of the other substantive provisions of the Interstate Commerce Act.

The Commission itself, in accordance with the Congressional mandate, has consistently applied this prohibition to rate levels only. This decision is an inexplicable departure from that consistent administrative construction and application.

The court below construes the "destructive competitive practices" phrase to give the Commission authority to prohibit pricing practices condemned under previously enacted antitrust statutes such as Section 5(a) of the Federal Trade Commission Act of 1914, 15 U.S.C. § 45(a) and Section 3 of the Clayton Act, 15 U.S.C. § 14 as well as by §14 Third of the Shipping Act of 1916, 46 U.S.C. § 812.

The Commission, in the twenty years during which it has been charged with the administration of the National Transportation Policy, has never placed such a construction on the "destructive competitive practices" prohibition, nor have the courts ever held that such a construction was proper. The Commission's report does not suggest that it conceives the prohibition to incorporate antitrust concepts in relation to regulated carrier pricing.

The court below's theory that it was the congressional purpose to apply antitrust and Federal Trade Commission pricing concepts to competition which has already been committed to administrative supervision and regulation is without support.

Whether or not the court below's construction is found to be proper, it is clear that it represents a novel interpretation of an important portion of the National Transportation Policy and, therefore, presents an important question relative to its interpretation and the administration of the Interstate Commerce Act.

2. The Commission finds the contract rates here involved are "unjust and unreasonable in that they constitute 'destructive competitive practices' within the meaning of the National Transportation Policy declared in the Act." 313 I.C.C. at 254. There is no finding of illegality under any section of the Interstate Commerce Act independent of this finding. Yet, it is clear the Commission majority discussed at great length Section 2 and Section 3 questions. As stated in the concurring opinion of Commissioners Walrath and Webb, the report contains "gratuitous dissertation implying that the proposed rates are unjustly discriminatory and unduly preferential and prejudicial within the meaning of Sections 2 and 3 of the Act." *Ibid.* at 255. The majority opinion itself concedes that it has considered and discussed Sections 2 and 3 and Elkins Act questions (*Ibid.* at 254) yet no conclusions are made with respect thereto.

Neither the three Commissioner majority report nor the court below were able to provide any meaningful relationship between the Commission's findings relating to Sections 2 and 3 and the Commission's ultimate conclusion that was limited to the unlawfulness of the contract rate in question under the "destructive competitive practices" provision of the National Transportation Policy.

The decisions of this Court require administrative agency opinions to clearly set forth the grounds upon which their determinations rest. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 511 (1935); *Beaumont, Sour Lake and Western Railway* v. *United States*, 282 U. S. 74, 86 (1930); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Securities and Exchange Commission* v. *Chenery*, 332 U. S. 194, 196-7 (1947); concurring opinion of Frankfurter, J., in *Secretary of Agriculture* v. *United States*, 350 U. S. 162, 175 (1956).

It is most interesting that the several appellees in the court below each provided a different set of findings which they alleged supported the Commission's ultimate con-

clusion under the National Transportation Policy. The court below selected yet other portions of the Commission's report than were selected by appellees and assumed, without discussion, that these were the findings intended by the Commission to support its ultimate conclusion.

The court below held that the Commission found that the tariffs would constitute a "destructive competitive practice" violating the National Transportation Policy, "primarily* in two respects,"

> "The first is that the indicated extension of the practice by the Central and the inevitable response of other rail, motor and water carriers would cause 'the destruction in large measure of what is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system,' p. 252. The second is that the effect of a contract such as proposed 'is to destroy competition for the duration of the contract', since 'During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior transportation service at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor', p. 253." 194 F. Supp. at 949.

But the court below was not able to clear up the problem of whether the Commission's finding with respect to the alleged destructive effect upon the rate structure was intended to support its ultimate conclusion relative to a destructive competitive practice in violation of the National Transportation Policy. That portion of the Commission's report is part of its discussion of purported unequal treatment as between shippers and is directed

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* The use of this word seems to cast doubt on the Court's own certitude in choosing what it conceives to be the Commission's supporting findings.

to distinguishing earlier Commission decisions wherein Section 2 unlawfulness was in issue.

In addition, the Commission, even before the promulgation of the National Transportation Policy in 1940, had condemned rates as being disruptive or destructive of a given rate structure. See, for example, *Ex-Lake Iron Ore from Chicago to Granite City,* 123 I.C.C. 503, 504 (1927); *Ex-Ohio River Coal to Ohio Points,* 185 I.C.C. 211, 219 (1932); *Gasoline from San Francisco Bay Points to Ogden, Utah,* 198 I.C.C. 683, 695 (1934); *Coal from Indiana to Illinois,* 200 I.C.C. 609, 621 (1934). Thus the finding may in fact be predicated upon purported illegality under portions of the Act other than the National Transportation Policy which were discussed but specifically disclaimed in the report of the three Commissioner majority.

Another factor militating against the validity of the selection by the court below of the supporting findings is that, situated between these two findings in the report, the Commission finds that the contract provision prohibiting an increase in rate during the contract period unless ordered by the Commission "appears to be inconsistent with the continuing obligation of common carriers to establish and maintain just and reasonable rates," 313 I.C.C. at 252. It does not seem reasonable that the Commission would separate those findings intended to support its ultimate conclusion with one that apparently does not. The Commission's report is confused and lacks the clarity requisite to a valid administrative determination.

3. As a consequence of the Commission's failure to clearly articulate the factual basis or bases which support its ultimate finding of "destructive competitive practice," the opinion fails to set forth or apply the standard of lawfulness enunciated by this provision in the National Transportation Policy. Thus, as demonstrated by the opinion of the court below, the Commission's decision does not provide any guide as to what this phrase means or what facts

must be considered in determining if and how this standard is abrogated by a contract rate. The Commission must go beyond the mere words of the statute in revealing the basis for their action so that that action may be effectively judged. *Dixie Carriers* v. *United States,* 143 Fed. Supp. 884, footnote at 850 (1956), reversed on other grounds, 355 U. S. 179 (1957); *Atchison, T&S.F. Ry. Co.* v. *United States,* 295 U. S. 193, 201-202 (1935). Since the court below could find no comfort in the Commission's report, it resorted to statutes other than the Interstate Commerce Act. The Court below implies that some sort of antitrust or Federal Trade Commission Act standard is involved. Whether or not this is so, it is clear that the Commission report has failed to set forth *any* standard. The standard applied must be clearly stated in the report of the Commission and the court below erred in supplying its rationale of the standard which the Commission might have but clearly did not use in its report.

4. Assuming the Commission's report makes clear which findings are intended to support its ultimate finding of illegality under the "destructive competitive practices" provision and these findings are the ones chosen by the court below, these findings are not supported by substantial evidence and are contrary to the evidence of record. The Commission's finding with respect to the destructive effect of the instant rates upon the rate structure is not supported by substantial evidence and is, in fact, contrary to the evidence of record. It is axiomatic that the *level* of rates in a given rate relationship or rate structure determines the lawfulness of that rate relationship or structure. There is no finding or even allegation that the level of the proposed rates is unlawful. Yet the Commission finds that their publication would have a destructive effect upon the "rate structure necessary to maintain an adequate national transportation system." The evidence of record amply demonstrates that these contract rates would actually preserve and not destroy any

rate structure since the lower contract rate published at an admittedly lawful level becomes applicable only when the carrier receives sufficient traffic to make its application economically feasible.

In *United States* v. *Chicago, M., St. P. & P. R. Co., supra,* at 507, this court held that a disruption in a rate relationship is unlawful only if the rate relationship previously existing is a fair one or if the Commission is without power to avert reprisals. In the instant case neither of these factors is present since the Commission has made no findings with respect to the existing Amsterdam-Chicago rate relationships and the Commission clearly has the power to prevent any further rate adjustments of a retaliatory nature. The court below applied a very narrow construction of the *Milwaukee* holding which seems contrary to the plain language and intent of that decision.

The findings of the Commission with respect to the destructive effect of the instant rates on competitors has no evidentiary basis in the record. There is no evidence whatsoever that a shipper would forego less expensive or superior service in order to either enter into or fulfill the contractual agreement.

There is no *per se* finding of illegality of contract rates made by the Commission. Instead, it states that:

> "[A]s in all other situations, the lawfulness of innovations of this kind must be determined based on the controlling circumstances in particular situations." (313 I.C.C. at 254.)

However, the Commission, in condemning these rates as a destructive competitive practice, specifically declines to consider the contentions made by the parties respective to their relative competitive positions (313 I.C.C. 248-249). Without a finding of *per se* illegality, it is submitted that relative competitive position is a controlling circumstance, and the failure of the Commission to make findings with

respect thereto is error. *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 Fed. Supp. 796 (1952) affirmed 231 F. 2d 356 (1955); cert. den. 350 U. S. 991 (1956), rehearing denied 351 U. S. 728; *Gerber Products Co.* v. *Beech-Nut Life Savers*, 160 Fed. Supp. 916 (1958).

Since the court below suggests that the meaning of "destructive competitive practice" in the National Transportation Policy is somewhat analogous to the concept of destructive competition under the antitrust statutes, it would follow that the courts and not the Commission are the final arbiters of the application of that standard. *F.T.C.* v. *Gratz*, 253 U. S. 421, 427-8 (1920); Frankfurter, J., dissenting in *F.T.C.* v. *Motion Picture Advertising Co.*, 344 U. S. 392, 404-405 (1953). Regardless of where the responsibility for making this determination lies, it is clear that it was error for the Commission to do so without considering the relative competitive position of the carriers, which is a determining factor requisite to any finding of destructive competition.

The questions presented by this appeal are substantial and they are of public importance.

Respectfully submitted,

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466 Lexington Avenue
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Dated: October 9, 1961.

APPENDIX A

NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES of America and Interstate Commerce Commission, Defendants,

National Motor Freight Traffic Association, Inc., the Eastern Central Motor Carriers Association, Inc., Boss-Linco, Inc., Interstate Motor Freight System, and Roadway Express, Inc., Waterways Freight Bureau, and the American Waterways Operators, Inc. and the Great Lakes Ship Owners Association, Intervening Defendants.

United States District Court
S. D. New York.
June 14, 1961.

Action by the New York Central Railroad Company to enjoin orders of the Interstate Commerce Commission, 313 I.C.C. 247, directing the Central to cancel a tariff providing for reduced commodity rates to shippers agreeing to move at least 80 percent of their traffic over the Central. The three-judge District Court, Friendly, Circuit Judge, held that the Commission had authority to find that the tariff was an unfair or destructive competitive practice under National Transportation Policy, and that the Commission's report was adequate to show that this was the basis of the orders.

Injunction denied and complaint dismissed.

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Interstate Commerce Commission had authority to find that railroad's tariff providing for reduced commodity

rates to shippers agreeing to move at least 80% of their traffic over railroad was an unfair or destructive competitive practice under National Transportation Policy, and Commission's report was adequate to show that this was basis of Commission's orders directing railroad to cancel such tariff. 28 U.S.C.A. §§ 1336, 2284, 2321-2325; Interstate Commerce Act, §§ 1, 2, 3(1), 15(7), 22, 501 et seq., 49 U.S.C.A. §§ 1, 2, 3(1), 15(7), 22, 1231 et seq.; Elkins Act, § 1(1) as amended 49 U.S.C.A. § 41(1); National Transportation Policy, 49 U.S.C.A. note preceding section 1; Clayton Act, § 3, 15 U.S.C.A. § 14.

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Frederick A. Babson, Jr., Washington, D. C. (Kenneth J. McAuliffe, New York City, Clyde B. Aitchison and John R. Turney, Washington, D. C., on the brief for Motor Carriers and Motor Carrier Assn's; Harry C. Ames, Washington, D. C., and Kenneth J. McAuliffe, New York City, on the brief, for Waterways Freight Bureau; and Kenneth J. McAuliffe, New York City, and John H. Eisenhart, Jr., Washington, D. C., on the brief for the American

Appendix A.

Waterways Operators, Inc. and the Great Lakes Ship Owners Ass'n), for intervenors.

Before FRIENDLY, Circuit Judge, and PALMIERI and METZNER, District Judges.

FRIENDLY, Circuit Judge.

This is an action by the New York Central Railroad, 28 U.S.C. §§ 1336, 2284 and 2321-2325, to enjoin orders of the Interstate Commerce Commission, in I. & S. Docket No. 7250, 313 I.C.C. 247, directing the Central to cancel tariffs, which had become effective due to expiration of the seven months' period of suspension, 49 U.S.C.A. § 15(7), establishing reduced commodity rates on rugs and carpeting in carloads from Amsterdam, New York to Chicago, Illinois, Judge Palmieri declined to grant a temporary restraining order; the case is now before us on application for final relief.

The regularly established rail and motor carrier rates for this traffic are, summarily stated, 185 cents per 100 pounds for a minimum of 24,000 pounds, and, in the case of the rail rates, 148 cents on weight in excess thereof. The tariff here directed to be cancelled provided for a rate of 155 cents for a minimum of 30,000 pounds and 125 cents on weight in excess of the minimum. However, and this is the bite of the case, the reduced rate was available only if the shipper executed a contract, in a form contained in the tariff, obliging him to move at least 80% of his annual Amsterdam-to-Chicago traffic over the Central; in the event of his failure to do that, the higher regular rate would apply. The contract contained provisions requiring the shipper to furnish an indemnity bond to insure such additional payment and to permit inspection of his records, and prohibiting the Central from volun-

tarily increasing the rates during the year, as well as other clauses not here material. "There is no dispute as to the compensativeness of the proposed rates.", 313 I.C.C. at 249.

After taking evidence in the form of verified statements, the Commission directed cancellation of the tariff. How the Commission did this needs be stated in some detail, since much of the Central's case hinges upon it.

The Report starts with 7½ printed pages headed "By the Commission" but actually presenting the views of three of the ten Commissioners then in office, unnamed in the report but in fact Commissioners Hutchinson, Tuggle and Goff. This opinion begins by reciting the tariffs, the economic background and the contentions of the Central and of opposing truck and water carriers. It says, *inter alia*, that "no sound classification basis appears for different rates on the same or substantially the same tonnage, dependent only on the proposed contractual arrangement.", p. 250; that under the proposed rates "it would be entirely possible for a shipment from a contracting shipper to be transported at the lower rate in the same train between the same two points with a shipment of equal or greater volume from a non-contracting shipper, without any discernible differences in transportation circumstances", p. 251; that "there is no rational basis for affording an 80-percent user a 13-percent reduction in the normal rates on a 40,000-pound shipment, as here proposed, while denying the reduction to one who is a 70-percent or a 75-percent user", p. 251; and that "there is no assurance that an 80-percent user would ship a regular and predictable volume of freight per day, week, or month." All this seems to presage a conclusion that the rates violated § 2 or § 3(1) or the Elkins Act, 49 U.S.C.A. §§ 2, 3(1), 41(1). Instead, after an intervening passage, pp. 252-254, primarily concerned with

the National Transportation Policy, which appears in 49 U.S.C.A. note preceding § 1, quoted in the margin,[1] the Report says "In view of our conclusions under section 1 of the act, there is no need to consider further the allegations under sections 2 and 3, and under the Elkins Act," p. 254, and concludes that the tariffs would constitute a "destructive competitive practice" violating the National Transportation Policy, as read into § 1, primarily in two respects. The first is that the indicated extension of the practice by the Central and the inevitable response of other rail, motor and water carriers would cause "the destruction in large measure of what is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system," p. 252. The second is that the effect of a contract such as proposed "is to destroy competition for the duration of the contract", since "During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior transportation service

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[1] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act * * *, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act * * * shall be administered and enforced with a view to carrying out the above declaration of policy."

at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor", p. 253.

Commissioner Murphy filed a concurring opinion stating he agreed "with the findings and conclusions of the majority except that I would also find that the rates under investigation are in violation of sections 2 and 3, and the Elkins Act", p. 254. Commissioner Walrath, joined by Commissioner Webb, was "reluctantly constrained to agree with the result reached by the majority" but objected to "gratuitous dissertation implying that the proposed rates are unjustly discriminatory and unduly preferential and prejudicial within the meaning of sections 2 and 3 of the act." Commissioners Winchell and McPherson concurred in the result. Commissioner Freas, joined by Commissioner Herring, dissented; they stressed the desirability of permitting "experimentation within legal limits" and thought "An attempt by means otherwise lawful to stem * * diversion or to regain traffic already lost can hardly be called unduly destructive."

The Central's principal attack is that the Commission failed to articulate the basis for its disapproval with the clarity required by such decisions as United States v. Chicago, M., St. P. & P. R. Co., 1935, 294 U.S. 499, 511, 55 S.Ct. 462, 79 L.Ed. 1023; Atchison T. & S. F. Ry. Co. v. United States, 1935, 295 U.S. 193, 201-202, 55 S.Ct. 748, 79 L.Ed. 1382; and the two Chenery decisions, Securities and Exchange Commission v. Chenery Corp., 1943, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 and 1947, 332 U.S. 194, 196-197, 67 S.Ct. 1575, 1760, 91 L.Ed. 1995. See also Mr. Justice Frankfurter, concurring, in Secretary of Agriculture v. United States, 1956, 350 U.S. 162, 175, 76 S.Ct. 244, 100 L.Ed. 173. An initial phase of this claim, that there was no conclusion on which a majority of the Commission agreed, is quite clearly unfounded. To be sure, it is somewhat hard to understand how the two Commissioners who

concurred only in the result could not have found in the three prevailing opinions some one with which to agree or, on a matter of this importance, why they did not at least elucidate why they could not. Neither is the concurring opinion of Commissioners Walrath and Webb fully understood by us; we find it somewhat hard to find a formula that rationally reconciles their belief that "Contract rates could well mean the end of a national transportation system, either as we have known it (highly workable despite its imperfections), or, as many hope to see it, a truly coordinated system featuring the use of each mode of carriage under single billing", their statement they were not certain they would reach the same adverse "result in all cases involving contract rates", and their disapproval of the instant ones. Still their ultimate conclusion is plain, and even if we were to eliminate the votes of Commissioners Winchell and McPherson altogether, six commissioners would have joined in concluding that the rates "are unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the national transportation policy declared in the act."

The reference to "unfair or destructive competive practices" came into the Interstate Commerce Act in the declaration of policy of the Motor Carrier Act of 1935, 49 Stat. 543. This language was later embodied in the preamble to the Transportation Act of 1940, 54 Stat. 899. The legislative hisory cited to us by the parties does not much illumine its content; neither, in any significant degree, do the decisions of the Commission to which we have been referred. More light is shed by earlier enactments using language not dissimilar. One that comes readily to mind is § 5(a) of the Federal Trade Commission Act of 1914, § 15 U.S.C.A. § 45(a), which declared unlawful "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Although these words themselves demand interpretation, the legislative history

makes it plain they were intended to go somewhat beyond common law concepts, see F. T. C. v. R. F. Keppel & Bro., Inc., 1934, 291 U.S. 304, 310-314, 54 S.Ct. 423, 78 L.Ed. 814, and they have come to be understood as authorizing the Federal Trade Commission to proscribe at least some sorts of overly aggressive competition that would not have been deemed unlawful without them. As was said in Hastings Manufacturing Co. v. F. T. C., 6 Cir., 1946, 153 F.2d 253, 257, concerning a manufacturer who bought products of other manufacturers from distributors and also made loans to distributors and guaranteed them increased profits as compared with those previously obtained, "* * * acts not in themselves illegal or criminal, or even immoral, may, when repeated and continued and their impact upon commerce is fully revealed, constitute an unfair method of competition within the scope of the Commission's authority to regulate and forbid." Simultaneously with the enactment of this general standard, Congress, in the Clayton Act, specified certain types of competition as unlawful—one of them, § 3, 15 U.S.C.A. § 14, to "fix a price charged * * *, or discount from, or rebate upon such price", in the case of sales or leases in commerce, "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller", where the effect may be to substantially lessen competition or tend to create a monopoly. Relevant also is the provision in § 14, Third of the Shipping Act of 1916, 46 U.S.C.A. § 812, making it unlawful for the water carriers regulated thereby to "Retaliate against any shipper" by refusing space "or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason", a provision held in Federal Maritime Board v. Isbrandtsen Co., Inc., 1958, 356 U.S. 481, 78

S.Ct. 851, 2 L.Ed.2d 926, to place a "dual rate" system dependent on exclusive patronage beyond the Maritime Commission's power to approve. We do not mean either that the general words in the National Transportation Policy, "unfair or destructive competitive practices", condemn *per se* all arrangements like those branded by express language in § 3 of the Clayton Act and in § 14, Third of the Shipping Act or, on the other hand, that the words of the Policy were limited to the precise practices so previously proscribed; we do mean that these earlier statutes give an idea of the kinds of competitive practices that Congress authorized the Interstate Commerce Commission, in the exercise of its informed judgment, to decline to countenance.

If this be sound, it is reasonably clear both that the Commission was authorized to find that a tariff such as that here filed by the Central was an "unfair or destructive competitive practice" and that the Commission's Report was adequate to that end. Plainly such a tariff would violate § 3 of the Clayton Act if that applied to services; it would be no defence either that no penalty other than loss of the discount would be suffered by using the services of competitors, see Carter Carburetor Corp. v. F. T. C., 8 Cir., 1940, 112 F.2d 722, 732, or that competitors could employ the same device, see F. T. C. v. R. F. Keppel & Bro., supra, 291 U.S. at pages 312-313, 54 S.Ct. at page 426. The effect of such a contract upon competition is quite different from that of mere reduction in charges. In the latter case a competitor who meets the reduction is in as good a position to compete as theretofore; here, even if he meets the contract tariff with a similar one, he has some initial handicap, and whichever competitor gets the traffic, the other is then in a poor position to compete. All this would be a valid consideration for the Commission if only competing railroads were involved; it is doubly so in view of Congress' direction in the National Transportation Policy "to recog-

nize and preserve the inherent advantages of each" mode of transportation.[2]

Taking the Commission's other conclusion, that a general adoption of contract tariffs "would be the destruction in large measure of what is in general a just, reasonable and otherwise lawful rate structure necessary to maintain an adequate national transportation system," the Central criticizes this as contrary to a statement, in United States v. Chicago, M., St. P. & P. R. Co., supra, 294 U.S. at page 509, 55 S.Ct. at page 466, that "The threat of such a [rate] war may be a reason for rejecting a new schedule" only "if the rate relation previously existing is a fair one, or * * * if the commission is without power to avert the reprisals and thereby nullify the threat." It contends that the Commission had no basis for finding the country-wide rate structure to be "in general just, reasonable and otherwise lawful", and also that the Commission has ample power to stop the spread of contract rates whenever it should find they were having a harmful effect. This is to apply Mr. Justice Cardozo's words to a situation wholly different from that to which they were addressed. The schedules that had been cancelled by the Commission in the Milwaukee cases involved no novel rate-making principle; they reduced the rates between certain Indiana mines and certain Illinois points so as to restore a relationship between the Indiana mines and mines near Springfield, Illinois that had long existed until upset by a series of

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[2] We see no inconsistency, such as the Central does, between this reasoning and the Commission's having not merely permitted but prescribed commutation fares, Passenger Fares between District of Columbia and Nearby Virginia, 258 I.C.C. 559, 569-570 (1944). Without going into other factors distinguishing commutation fares, it is enough that such fares involve savings in sales expense, consistency of use, or both, not here demonstrated, and that the National Transportation Policy could hardly be read to have made a differential long permitted by § 22 of the Act, 49 U.S.C.A. § 22 into an "unfair or destructive competitive practice."

other rate changes initiated by a decrease in the Illinois intrastate rates. Quite naturally, the Court insisted that the new schedules ought not be cancelled unless and until the Commission found that a rate relationship differing from the historic one was a fair "rate relation", and that this conclusion was not to be gainsaid because of a threat of further reduction in the Illinois rates, which were "subject to the power of the Commission, which may keep the changes within bounds." The Court scarcely meant by all this to say that the Commission was powerless to prevent a novel rate making practice, which it believed would undermine the historic rate structure whereby carriers may freely compete for particular shipments on the basis of price and service, a structure the Commission might competently conclude had served the national interest generally, unless it was able to and did find that every single rate in that structure was precisely fair and reasonable. Similarly, although allowing the instant rates to become effective would, of course, not preclude the Commission's taking contrary action in the future, the Commission was not compelled to permit the experiment, even if we assume it might lawfully have done so. There was no showing of circumstances uniquely demanding or justifying this practice with respect to the movement of rugs and carpeting from Amsterdam to Chicago. Indeed, the matter seems rather to have been presented as a test case; as stated in the Report, p. 252, "The respondent concedes that if these rates are approved it will extend contract rates to other points and other commodities, and the motor carriers flatly state that they will follow."

One other contention of the Central must be mentioned. It calls our attention to a statement by then Chairman Freas before a subcomittee of the Senate Committee on Interstate and Foreign Commerce, in the hearing which led to the Transportation Act of 1958, 49 U.S.C.A. § 1231

et seq., 72 Stat. 568, 85th Cong., 2d Sess. Part 3, pp. 1899-1900, in which, after referring to the contract rate practice "now invoked in Canada and in some of the other foreign countries", the Commissioner said "there was nothing in the law now to prevent it so long as the rate adjustment does not create undue discrimination or preference and prejudice" and "our specific recommendation * * * is that there is nothing for the Congress to do." This, says the Central, is quite inconsistent with the Commission's Report here, holding, over Commissioner Freas' dissent, that there is something "in the law to prevent" the proposed rates even though these have not been found to violate §§ 2 or 3 or the Elkins Act. One can readily understand that, after the Commissioner's statement, the Central might have expected a more favorable reception of its proposal. However, even passing the points that Chairman Freas' remark was addressed to "agreements with shippers for lower rates * * * where justified by savings in cost in return for a guaranteed quantity of tonnage or guaranteed proportions of the shipper's total volume", savings not shown here, and that he also characterized this as "a highly controversial matter and one on which the Commission has not had occasion to express itself", it would be distilling sunbeams from cucumbers to say that such a statement before a Senate subcommittee constituted an administrative construction of the National Transportation Policy binding either *ex proprio motu* or because of the Congressional inaction it may have helped to induce.

The United States, the Commission and the intervening motor and water carrier defendants have presented other contentions in support of the order which we find it unnecessary to consider. The injunction is denied and the complaint dismissed.

Appendix A.

29350

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET No. 7250

CONTRACT RATES ON RUGS AND CARPETING FROM AMSTERDAM, N.Y., TO CHICAGO

Decided February 13, 1961

Proposed contract rates on rugs and carpeting from Amsterdam, N.Y., to Chicago, Ill., found unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the national transportation policy. Schedules required to be canceled, and proceeding discontinued.

Robert D. Brooks, Alfred A. Green, and *William C. Leiper* for respondent.

Clyde B. Aitchison, John R. Turney, and *Frederick A. Babson, Jr.,* for protestant motor carriers.

John H. Eisenhart, Jr., Wesley A. Rogers, James L. Givan, and *Harry C. Ames* for protestant water carriers.

George H. Kinney for intervener in support of respondent.

C. J. Braun for intervener in support of protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Pursuant to an agreed order entered herein, special rules of procedure were followed. All evidence was submitted in the form of verified statements, and an examiner's pro-

posed report was waived. Oral argument has been heard. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The respondent, The New York Central Railroad Company, by schedules filed to become effective on September 30, 1959, proposed to establish reduced rates[1] on rugs and carpeting, in carloads from Amsterdam, N.Y., to Chicago, Ill. Upon protest of various motor and water common carriers and associations thereof, the operation of the schedules was suspended to and including April 29, 1960, when they became effective.

The proposed contract rates are 155 cents, minimum 30,000 pounds, and 125 cents on weight in excess of that minimum. The tariff contains the form of a contract which must be executed by the shipper and filed with the respondent's tariff-publishing agent as a condition precedent to the application of the rates. According to its terms, for a period of 1 year the shipper must agree to move at least 80 percent of its Amsterdam-to-Chicago traffic over the lines of the respondent. The shipper is required to furnish an indemnity bond guaranteeing the payment of the higher noncontract rates which would become effective in the event the shipper should default in performance. The shipper agrees to permit inspection of pertinent shipping data in its records, and, at the end of the contract term, to furnish the respondent an affidavit setting forth the total tonnage shipped by all modes of transportation.

The agreement prohibits the respondent from voluntarily increasing the contract rates during the term thereof, and permits the shipper to cancel, without the payment of any further charges, if the respondent fails to deliver 70 percent of the traffic at Chicago on or before the sixth morning after its receipt at Amsterdam. The contract rates

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[1] Rates are stated per 100 pounds.

are available to all shippers or receivers willing to execute the contract. Other provisions concern renewal of the contract and its suspension during periods of strike and other emergencies.

The protestants urge that the proposed rates are contrary to the national transportation policy, are unjust and unreasonable in violation of section 1 of the act, are unjustly discriminatory contrary to section 2, create undue preference and prejudice in contravention of section 3, violate the Elkins Act by unlawful concessions or advantages, and are proscribed by certain of the antitrust laws.

There are presently published on this traffic rail rates of 266 cents, minimum 14,000 pounds; 185 cents, minimum 24,000 pounds, with a rate of 148 cents on weight in excess thereof (at which recent rail traffic has moved); and a piggyback rate of 185 cents, minimum 24,000 pounds. The current motor-carrier rate also is 185 cents, minimum 24,000 pounds.

The supporting shipper is the largest firm in the rug and carpet industry, having six plants located at points other than Amsterdam. The shipper's witness stated that in supporting the proposed rates he spoke on behalf of that industry generally. The commodities originate at eight additional points in eastern-central territory, each of which is served by at least one railroad and by numerous motor carriers.

At one time all of this traffic moved over the lines of the respondent. Between 1955 and 1958, its participation declined from 913 to 159 carloads. These articles are included in commodity group 713, manufactures and miscellaneous freight, and the respondent presented data establishing its declining participation in such traffic from 1948 to 1958. On the other hand, the protestants submitted data covering the period from 1937 through 1958, indicating that the respondent's participation in the considered traffic has increased, and they maintain that its declining volume

of manufactures and miscellaneous traffic is due principally to a geographical shift in industry from the East to the South and West. In view of our ultimate findings, it is unnecessary to consider further these conflicting contentions.

There is no dispute as to the compensativeness of the proposed rates. Our determination in this proceeding depends chiefly on whether the rates are lawful in the manner of their publication.

The respondent asserts that traditional ratemaking practices have failed to halt diversion of the traffic. It insists that, except for the contract feature, the rates in question are merely another form of incentive rates, and that the idea of contract rates is not new, referring to passenger commutation fares, contracts for hauling circuses, and various intrastate contract rates. It is presently participating in so-called agreed charges in Canada, which it claims are constructed on a basis similar to that of the proposed contract rates. General arguments referring to the passage of the railroads' monopoly position, the growth of for-hire and private motor transportation, and other matters bearing on changes in the general economy are made. These arguments are directed mostly to the contention that existing ratemaking principles and standards of lawfulness should be changed. Our attention here, however, is focused on the question whether the rates are lawful under the existing statute.

The agreed charges in Canada are authorized by special legislation enacted in 1938 and inspired originally by provisions in the British Road and Rail Traffic Act of 1933, which inaugurated this departure from orthodox ratemaking. Report of Royal Commission on Agreed Charges, 1955, pages 13, 33. Such charges were specifically authorized to aid the railroads to cope more effectively with competition from other modes of carriage, especially motor transportation, which is relatively free from regulation in Canada.

Appendix A.

Basically, the respondent argues that contract rates are an appropriate method of recognizing the economic difference to a railroad of "consistent" and "stand-by" use of its services, as reflected, for example, in the sale of commutation passenger tickets. Such tickets are based on the principle of mass transportation. The proposed rates are not dependent upon the tender of any specific volume (as opposed to percentage) of traffic. Moreover, commutation tickets are specifically authorized in section 22(1) of the act, viz: "* * * nothing in this part [part I] shall prevent * * * the issuance of mileage, excursion, or commutation passenger tickets; * * *." The same section provides that nothing shall prevent the giving of reduced rates for the transportation of property in emergencies (if authorized by an order containing specific details), and that no carrier shall be deemed to have violated the provisions regarding undue or unreasonable preference or unjust discrimination "by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order * * *." The existence of commutation passenger tickets affords no legal basis for the contract rates on property here under investigation.

The respondent maintains that it is seeking to avoid "a destructive and prohibitive cost that attaches to a standby carrier service"; that it is attempting reasonably to classify the traffic on the basis of the difference in consistent and standby service. Under the contract rates, it asserts that it would be able to recapture lost traffic and at the same time preserve its revenues from other traffic hauled under different conditions.

Classification of articles, in carloads, among other things, reflects density, value, susceptability to loss and damage, and the quantity which on the average can be tendered as one shipment. Volume of movement also is important, but not the percentage of the total movement in a given period regardless of the volume. As stated, the proposal rests

on a percentage basis over an extended period, without reference to the tonnage offered other than the carload minimum. Thus, no sound classification basis appears for different rates on the same or substantially the same tonnage, dependent only on the proposed contractual arrangement. Under present ratemaking practices, a "consistent" shipper of one shipment per month should be accorded a rate no different from that available to another shipper who in the same year makes 12 shipments of the same commodity from and to the same points, all in 1 month.

These contract rates would be available to any shipper willing to pledge 80 percent of its traffic. Thus, they are not subject to the objection that they favor the large over the small shipper. Nevertheless, the proposal fails to conform to statutory standards of lawfulness, as herein explained.

In *Forwarder Rates Conditioned upon Aggregates of Tonnage,* 264 I.C.C. 225, 231, division 2 stated:

> It is settled that difference in the quantity shipped as a single shipment may justify a fair and reasonable difference in transportation rates. This difference is usually justified by a showing of a lesser cost of service for a larger than for a smaller shipment, other things being equal. * * * The mere fact that a single patron offers a transportation company a specified amount of freight in varying quantities and at different times during a period of 1 year cannot under the cost of service theory justify a basis of rates different from those applied to a single shipment, *for the aggregate amount shipped or to be shipped in the 12-month period has no relevant bearing on the cost of a particular shipment.* [Emphasis added.]

And in *Molasses from New Orleans La., to Peoria and Pekin, Ill.,* 235 I.C.C. 485, wherein multiple-car rates were first approved, it was stated (page 498):

> It is well settled that differences in the quantities shipped as a *single shipment* may afford a fair and reasonable basis for differences in transportation rates. [Emphasis added.]

In the latter case, the rates approved were designed to meet barge competition whose unit of transportation was

not limited to single carloads and the advantage in large shipments was thus already in existence. The record showed that the railroads could move molasses in multiple-car quantities at a materially lower cost than they could move single carloads. There is here no showing of any material cost advantage to the respondent under the proposed rates as compared with like shipments moved from and to the same points by noncontracting shippers at the higher rates. Should these contract rates become effective, it would be entirely possible for a shipment from a contracting shipper to be transported at the lower rate in the same train between the same two points with a shipment of equal or greater volume from a noncontracting shipper, without any discernible difference in transportation circumstances.

There are certain conditions under either of which the assessment of different charges for the same haul between the same points may be justified: (1) where the lower charge reflects a lower cost of performing the service on one shipment than on another for which the higher charge applies; (2) where the total transportation services rendered the shipments are different; or (3) where in other respects the circumstances directly affecting the transportation of the respective shipments differ materially. The principle upon which the respondent attempts to justify these contract rates does not appear to be susceptible to translation into cost-of-service data. There is no contention that the total transortation services performed for the contracting shipper would differ materially from those for the noncontracting shipper, and no other circumstances directly affecting the transportation of the respective shipments are shown to differ materially. On the contrary, it does appear that, since the volume of traffic tendered by a shipper is not a factor, an 80-percent user with relatively little total volume could be accorded lower rates than a 50-percent user with a much larger volume. The wholly

arbitrary nature of the 80-percent figure as a dividing line between those entitled to reduced rates and those not so entitled may be further illustrated. For example, so far as this record indicates, there is no rational basis for affording an 80-percent user a 13-percent reduction in the normal rates on a 40,000-pound shipment, as here proposed, while denying the reduction to one who is a 70-percent or a 75-percent user. On the other hand, if the 80-percent user is entitled to such a reduction, it would be difficult to deny a 90-percent or a 100-percent user a still greater reduction. Moreover, it does not necessarily follow that one who agrees to ship 80 percent of his total yearly tonnage over the respondent's line would be a consistent user of the respondent's services in any meaningful sense; that is, there is no assurance that an 80-percent user would ship a regular and predictable volume of freight per day, week, or month. Nor is there any showing that the 80-percent requirement would produce that result where a lesser figure would not.

The instant situation differs substantially from that in other proceedings in which so-called volume rates were approved. Thus, in *Coal from Ky., Va., and W. Va. to Virginia,* 308 I.C.C. 99, reduced rates on bituminous coal conditioned upon the receipt by the consignee of a specified minimum tonnage during a stated period, were approved. The reduced rates were found necessary for the respondents to retain traffic which otherwise would have been lost by the construction of a mine-mouth generating plant by the utility using the coal for which the reduced rates were established. To the same effect is *Coal from Ill., Ind., and Ky. to Illinois and Indiana,* 308 I.C.C. 673, wherein approval was given to multiple-car rates on bituminous coal from midwestern mines to Chicago, Ill., and points grouped therewith. Recently, in *Coal to New York Harbor Area,* 311 I.C.C. 355, we approved reduced rates on bituminous coal to electric utilities conditioned upon the receipt

of at least 500,000 tons annually, the reduction applying on amounts over specified volumes. Those rates were aimed at preventing the loss of important coal volume, now moving to such utilities, to offshore residual oil.

In none of the foregoing proceedings did it appear that the approved rates would have a destructive effect upon other rates. The situation here differs. The respondent concedes that if these rates are approved it will extend contract rates to other points and other commodities, and the motor carriers flatly state that they will follow. If this occurred between points on the lines of the respondent and the competing motor carriers, it could be expected to spread to other railroads and motor carriers, and eventually to encompass much or most of the traffic of the country. The end result, in our judgment, would be the destruction in large measure of what is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system. Such a destructive effect upon the general rate structure may not be countenanced without strong and compelling reasons, which are absent here.

Moreover, the provision in the contract that no increase could be made in the contract rates during the effectiveness of the contract unless otherwise ordered by the Commission, even though changed conditions might warrant such an increase, appears to be inconsistent with the continuing obligation of common carriers to establish and maintain just, reasonable and otherwise lawful rates.

The protestants contend also that these contract rates violate the Sherman antitrust law. In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79, the Court pointed out that we have no power to enforce the Sherman Act or to decide definitively whether a particular matter constitutes a restraint of trade or an attempt to monopolize which is forbidden by that act, and that the policies expressed in the Interstate Commerce Act and other legislation dealing

specifically with transportation facilities and problems must be the basic determinants of our action. Continuing, the Court made it clear that while the policy of the antitrust laws determines the "public interest" in railroad legislation only in a qualified way, we may not ignore that policy as a relevant factor in fostering the objectives of the national transportation policy, which is our guide to the "public interest," *id.*, pages 80, 82-86. Thus, while a determination by us under the Sherman Act would be wholly gratuitous, we may not be unmindful of the general policy of the antitrust laws in favor of competition in applying the standards of the Interstate Commerce Act.

By the terms of the national transportation policy, we are required to administer the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each mode of transportation, and to encourage the establishment and maintenance of reasonable charges for transportation services, "without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." The policy further provides that "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." See *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 87-88; *Eastern-Central Motor Carriers Assn.* v. *United States,* 321 U.S. 194, 205-206; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 82-83. Thus, the policy gives meaning and content to the standard, among others, of "just and reasonable" referred to in sections 1 and 15(7) of the act.

The inevitable effect of a substantially exclusive patronage contract such as is involved here, considering especially the contractual conditions described herein, is to destroy competition for the duration of the contract. During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior

transportation service at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor. We are directed by the national transportation policy to "preserve" the inherent advantages of the various modes not to approve contracts which prevent the effective assertion of those advantages. These are matters which may not be ignored. As indicated, the respondent advanced competitive necessity as a justification for its contract rate proposal. However, where lower rates on traffic, all of which moves under substantially similar transportation circumstances, are necessary to regain or retain traffic, the remedy of reducing regularly published rates is available and should be used.

In view of our conclusions under section 1 of the act, there is no need to consider further the allegations under sections 2 and 3, and under the Elkins Act.

Constructive ratemaking innovations by carriers are desirable so long as they are consistent with the standards of lawfulness in the act and the national transportation policy. As in all other situations, the lawfulness of innovations of this kind must be determined based on the controlling circumstances in particular situations.

We find that the contract rates under investigation are unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the national transportation policy declared in the act. An order will be entered requiring their cancellation, and discontinuing the proceeding.

COMMISSIONER MURPHY, concurring:

I agree with the findings and conclusions of the majority except that I would also find that the rates under investigation are in violation of sections 2 and 3, and the Elkins Act.

The proposal herein affords different treatment to contracting shippers and noncontracting shippers where no

dissimilar circumstances affecting the transportation exists. Also, the provision permitting shipper cancellation of the contract without payment of further charges where the carrier fails to deliver 70 percent of the shipments in any one month on or before the sixth morning, could conceivably be used to discriminate. Thus, it is evident that the proposed rates would be unjustly discriminatory in violation of section 2 of the act.

Further, it would be entirely possible for a shipment from a contracting shipper to be transported at the lower rates in the same train between the same origin and destination with a shipment of equal or greater volume from a noncontracting shipper and the latter charged a higher rate. In my opinion this practice is preferential and prejudicial in violation of section 3.

Section 1 of the Elkins Act makes it unlawful to offer, to grant, to give, or to solicit, to accept, or to receive, any rebate, concession or discrimination in respect of the transportation of any property in interstate commerce by any common carrier subject to the Interstate Commerce Act, whereby any such property shall by any device whatever be transported at a less rate than the published tariff rate, *or whereby any other advantage is given or discrimination is practiced.* [Emphasis added.] The contract rates here, being based on no identifiable difference in transportation circumstances, amount to a concession to a contract shipper whereby an advantage is given or discrimination is practiced within the meaning of that act.

COMMISSIONER WALRATH, whom COMMISSIONER WEBB joins, concurring in the result:

Were it not for my conception of our obligation under the national transportation policy, I would join my Brother Freas in his dissenting expression. That policy, however, encompasses a system by "water, highway, and rail, as well as other means, adequate to meet the needs

of * * * commerce * * * and of the national defense." Contract rates could well mean the end of a national transportation system, either as we have known it (highly workable despite its imperfections), or, as many hope to see it, a truly coordinated system featuring the use of each mode of carriage under single billing—in essence, an optimum combination of the inherent advantages of each according to the needs of the traffic and the desires of the shipper. It seems improbable that such can be achieved or maintained if common carriers of the separate modes may by ontract tie desirable traffic to themselves.

This is far from saying, however, that the proposal fails to reflect "sound classification basis," "cost advantage," or "discernible difference in transportation circumstances." Since this is a case of first impression, I would have preferred that the report not include gratuitous dissertation implying that the proposed rates are unjustly discriminatory and unduly preferential and prejudicial within the meaning of sections 2 and 3 of the act.

All in all, I am reluctantly constrained to agree with the result reached by the majority. And although, by no means certain that I would reach that result in all cases involving contract rates, I am persuaded that general approval of this method of ratemaking should not be extended in the absence of appropriate legislation by the Congress.

COMMISSIONERS WINCHELL and MCPHERSON concur in the result.

COMMISSIONER FREAS, whom COMMISSIONER HERRING joins, dissenting:

Subject to certain overriding limitations prescribed by law in the public interest, the present regulatory scheme provided by the Congress leaves the full measure of responsibility for the initiation of rates upon the carriers

themselves. We have exhorted carrier management to consider carefully the matter of their transportation pricing practices. Clearly we cannot permit a publication that is unlawful, but we may be expected to allow experimentation within legal limits.

Only experience would demonstrate whether the proposed method would satisfy the expectations of its proponent. It may be expected that if it were permitted here others would resort to counteracting measures. By condemning the practice upon its inception, the question of its efficacy will necessarily remain unresolved.

It is the duty of the Commission in appropriate proceedings such as the one here involved to examine rate proposals to determine their lawfulness, but it is not our function, in the absence of illegality, to substitute our judgment for that of the carriers with respect to the wisdom of their proposals. Our problem here is to determine the legality or illegality of the course management, in its discretion, has decided to pursue. The sole question is, or should be, "Is the filed tariff unlawful and, if so, in what respect?"

It is clear that the motive for respondent's action is provided by the existence of intense competition between carriers, but the desire to improve one's competitive position is not condemned by the specific statutory provisions we administer, by the national transportation policy, or by the Elkins Act. In fact, it is the declared policy of the law that competition is to be encouraged. Only when competition becomes unduly destructive is it to be restrained. It is important to note the word "unduly," for any competition tends to be destructive of competing interests in some degree.

The majority states: "At one time all of this traffic moved over the lines of the respondent. Between 1955 and 1958, its participation declined from 913 to 159 carloads." An attempt by means otherwise lawful to stem such diversion or to regain traffic already lost can hardly be called

unduly destructive. The majority, however, is concerned with a feared destructive effect upon "what is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system." There is no evidence here before us establishing that under conditions then obtaining the rate structure at the time the proposal was made was the precise one or the only one "necessary to maintain an adequate national transportation system." Nor is there anything in this record to indicate that any shipper would actually forego the inherent advantages of motor transportation on virtually all of its traffic merely by reason of the establishment of the proposed contract rates which apply to carload traffic only. The proffered rates are admittedly compensatory. As urged by respondent, they should promote the consistent and better utilization, acquisition and maintenance of facilities and thus reduce the cost of performing the service.

The majority states that the rates "are not subject to the objection that they favor the large over the small shipper," but finds that the proposal "nevertheless * * * fails to conform to statutory standards." In support of this finding it quotes from *Forwarder Rates Conditioned upon Aggregates of Tonnage, supra,* and from *Molasses from New Orleans, La., to Peoria and Pekin, Ill., supra,* to the effect that different rates on a specified amount of freight under stated conditions are not justified "under the cost of service theory." Conceding this, it is far from saying that they are not justified under any theory. There is nothing in this record to show that rates are extended to any one shipper and withheld from others under like conditions, and no shipper is complaining. The same is true with respect to the allegation of undue preference and prejudice.

It is argued that "it would be entirely possible for a shipment from a contracting shipper to be transported at

the lower rates in the same train between the same two points with a shipment of equal or greater volume from a noncontracting shipper" and the latter charged the higher rates. This in itself does not constitute a violation of the act. Nor does the charging of lesser amounts on given shipments than on others of like commodities in equal or greater amounts transported in the same train between the same points introduce an innovation in transportation pricing. The situation has obtained over the years. It is encountered, by way of example, in the pricing of overflow shipments authorized by the governing freight classifications. The majority, however, in addition states that the difference in charges is "without any discernible difference in transportation circumstances." But traffic which assures or occasions an overall improvement in efficiency or economy in the performance of certain operations has been found to warrant a difference in treatment, ratewise, from that accorded to other freight, even though consisting of identical commodities moving in the same quantities from and to the same points. See *Return Load Rule—Emery Transp. Co.,* 310 I.C.C. 473; and compare *Consolidation of Freight Forwarder Shipments,* 310 I.C.C. 191. An attempt is made here by the majority to distinguish three recent cases involving coal, but the factors stressed there do not appear to be wholly relevant to this particular argument. Furthermore, neither the indicated contingency nor the relationship of the total qualifying annual tonnage to the cost of handling either single shipments or of handling a similar aggregate volume moving under ordinary rates during a corresponding period, was considered important enough in No. 32871, *Coal to New York Harbor Area, supra,* to prevent there the approval of what, in effect, are contract rates. It is odd that in the latter proceeding the various and different specified minimum qualifying annual tonnages provided for obtain-

ing the benefit of the lower rates were not deemed sufficient to condemn the rates, whereas here the majority seems to indicate that the required uniform percentage of a shipper's annual traffic does lead to unlawfulness. The 80-percent judgment figure is no more arbitrary, in my opinion, than the innumerable other specific limitations contained in tariffs regarding volume and level of rates.

The terms of the proposed bilateral agreement that the shipper, as consideration for his undertaking to offer 80 percent of the traffic, be assured of a minimum quality of service for most of his shipments, insofar as time in transit is concerned, and of a firm rate during the relatively short period of 1 year, seem to me to be reasonable provisions not affecting the basic lawfulness of the proposal.

I have reviewed what appear to be the controlling bases for the majority's findings as set forth in the report. I fail to see how the proposed rates may be either destructively competitive or unjust and unreasonable. I consider the findings unsupported.

APPENDIX B

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Proof of Service

I, Robert D. Brooks, one of the attorneys for The New York Central Railroad Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of October, 1961, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and to Michael I. Miller, Esq., Attorney, Department of Justice, Washington 25, D. C. and to Robert M. Morgenthau, Esq., United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York City.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Waterways Freight Bureau, The National Motor Freight Traffic Associations, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., The American Waterway Operators, Inc., and the Great Lakes Ship Owners Association, intervening defendants, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record, as follows

   To Harry C. Ames, Esq., Attorney for Waterways Freight Bureau, Transportation Building, Washington 25, D. C.

Proof of Service.

To Frederick A. Babson, Jr., Esq., Attorney for National Motor Freight Traffic Associations, Inc. The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., Interstate Motor Freight System and Roadway Express, Inc., 2001 Massachusetts Avenue, N. W., Washington 25, D. C.

To John H. Eisenhart, Jr., Attorney for American Waterways Operators, Inc., and the Great Lakes Ship Owners Association, Inc., Suite 411, 1025 Connecticut Avenue, N. W., Washington 6, D. C.

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